

REMARKS

This Amendment is submitted in response to the Examiner's Action dated 23 May 2003.

In the Office Action dated 23 May 2003, the Examiner rejected Claims 1-56 on the following grounds:

- (1) the Examiner rejected Claims 1, 13, 20, 24 and 39 due to matters of form;
- (2) the Examiner rejected Claims 1-56 under 35 USC § 103(a) as being obvious in view of *Walker et al.* (USPN 6,049,778) and *Shkedy* (USPN 6,260,024).

Applicant traverses this rejection and submits evidence and arguments in support of the patentability of the pending and new claims.

Before the merits are addressed, Applicant will provide a brief overview of the legal standard which is applicable.

THE LEGAL STANDARD FOR REJECTIONS UNDER 35 USC § 103

The following provides an overview of the applicable legal standards for determining "obviousness":

- (1) **WHAT IS EXAMINED:** 35 U.S.C. §103 mandates that the invention "as a whole" be considered in making an obviousness determination, and reads as follows:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences

between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made."

(2) **THE OBVIOUSNESS TEST:** In *Graham v. John Deere Co.*, 383 U.S. 1,148 USPQ 459 (1966), the Supreme Court set forth the basic test for determining if an invention is obvious, stating at 383 U.S. 17-18:

"...the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined."

(3) **TIME FRAME OF THE ANALYSIS:** 35 U.S.C. §103 mandates that the analysis be performed "at the time the invention was made".

(4) **THE BURDENS:** The USPTO bears the burden of establishing a *prima facie* case of obviousness, as is adequately summarized in *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992) which reads in relevant part, at 972 F.2d 1783, 1784:

"In proceedings before the Patent and Trademark office, the Examiner bears the burden of establishing a *prima facie* case of obviousness based upon the prior art [The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the

references. The patent applicant may then attack the Examiner's *prima facie* determination as improperly made out, or the applicant may present objective evidence tending to support a conclusion of nonobviousness."

What is required to meet this burden and establish a *prima facie* case of "obviousness" is quite particular, as explained in *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), at 837 F.2d at 1598, 1599, 1600, with emphasis supplied:

"The PTO has the burden under section 103 to establish a *prima facie* case of obviousness It can satisfy this burden only by showing some **objective** teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teaching of the references."

(5) **THE REQUIREMENT OF A WRITTEN EXPLANATION:** 35 U.S.C. §132 provides the standards for a written explanation of a rejection, stating in relevant part:

"Whenever, on examination, any claim for a patent is rejected, or any objection or requirement made, the Commissioner shall notify the applicant thereof, stating the reasons for such rejection, or objection or requirement, together with such information and references as may be useful in judging the propriety of continuing the prosecution of his application; . . .
."

(6) **IMPERMISSIBLE ACTIVITIES:** A substantial body of law exists which constrains the USPTO to proper considerations in performing an obviousness analysis. A few particular constraints are pertinent in the present application and will now be discussed.

First, obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion that the combination be made. See *In re Stencel*, 828 F.2d 751, 4 USPQ2d 1061 (Fed. Cir. 1987).

Second, the mere fact that the prior art could be modified as suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. See *In re Laskowski*, 871 F.2d 115, 10 USPQ2d 1397 (Fed. Cir. 1989).

Third, before the USPTO may combine the disclosures of two or more prior art references in order to establish *prima facie* obviousness, these must be some suggestion for doing so, found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Fourth, there must be some reason, suggestion or motivation found in the prior art whereby a person of ordinary skill in the field of the invention would make the combination, and that knowledge cannot come from the appellant's invention itself. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

Fifth, it is impermissible for the USPTO to simply engage in hindsight reconstruction of the claimed invention, using the applicant's invention as a template and selecting elements from the references to fill the gaps. See *In re Gorman*, 933 F.2d 982, 18 USPQ2d 1885 (Fed. Cir. 1991).

REVIEW OF THE OFFICE ACTION

In the Office Action, the Examiner states that *Walker et al.* teaches all the limitations of Claims 1-56 because it teaches an e-commerce site that provides buyers with a reward for purchasing goods early and progressively recalculates the reward as product is purchased at later times. The Examiner specifically directs the Applicant's attention to the Abstract, Summary, and Drawings of *Walker et al.*

However, in the Office Action, the Examiner expressly admits that *Walker et al.* does not teach six specific features found in the claims.

Specifically, the Examiner admits that *Walker et al.* does not teach the following:

- (1) creating pricing in accordance with financial risk;
- (2) pre-qualifying buyers;
- (3) aggregating offers from a varying group of purchasers;
- (4) utilizing a plurality of cascading graphical user interface screens;
- (5) aggregating the buyers' offers and sending them to the manufacturer for acceptance;
- (6) providing aggregated input from a plurality of potential purchasers to potential manufacturers in-part in return for a production guarantee from potential manufacturers.

The Examiner's arguments with respect to these six points will now be analyzed. The first four items will be discussed in detail. The last two items will be discussed after the Shkedy reference is summarized.

1. PRICING BASED ON RISK: With respect to the concept of pricing in accordance with financial risk, the Examiner contends that it is "old and well known in the art to offer lower prices to people who are early adopters." Furthermore, the Examiner states that it "would be obvious to a person of ordinary skill in the art to include in *Walker et al.*, associating rewards for early adoption based on risk, because this would provide a formulation by which a price-reward schedule could be quantified."

There is a serious question about whether or not the Examiner is using the term "early adopters" in a conventional way. This is significant since Applicant's invention is not limited to the introduction of new products; Applicant's invention is directed to the a new marketplace which rewards early financial commitments, and it is equally applicable to old conventional products and new or novel products. We look to the cited prior art and the present application to help resolve this question.

Walker et al. clearly utilizes the term "early adopter" in a conventional sense. See Column 2, lines 51-53, of *Walker et al.* which states: "Upon attaining a predetermined level of success, a selected set of "early adopter" purchasers (purchasers who buy a product early in the the product's life cycle) are rewarded". The entire specification of *Walker et al.* utilizes the term "early adopter" in a manner which is consistent with this definition. *Shkedy* makes no mention of "early adopters" whatsoever, so it is of no help in resolving this question. The present invention mentions "early adopters" but the application clearly distinguishes "early adopters" from early financial commitments. Applicant directs the Examiner's attention to the following quotations:

(1) See page 19, lines 9-12, which states the following about the applicability of the present invention: "In fact the preferred embodiment contemplates simultaneously applying the present invention to a wide array of products. In fact, the present invention is especially well suited for selling a wide array of unrelated nonperishable consumer goods or articles of manufacture. Additionally, the present invention has applicability to produced or processed perishable goods".

(2) See page 4, lines 10-17, which states the following about the prior art pricing strategy for new products: "...most manufacturers, wholesalers, and retailers follow a simple pricing plan in which new products are introduced at an initial price which is, in some cases, the highest price that will ever be charges for the product, and proceed to repeatedly discount the price in order to deplete supply. Of course, this approach severely punishes those consumers who are "early adopters" or early purchasers of products, and can result in pricing strategies which are so aggressive that consumer interest and demand is

essentially squelched before it can begin.”;

(3) See page 6, lines 11-14, which discusses the pricing strategy of the present invention: “...those customers that commit prior to production or early in the production cycle will receive the best price because the manufacturer has accepted less risk and incurred less cost. The early adopters or purchasers are, in effect, sharing risk with the manufacturer.”

Clearly, the present invention recognizes the difference between “early adopters” and “purchasers”. Based on the foregoing analysis, for purposes of proceeding, we will assume that the Examiner is using the term “early adopter” in a conventional way.

Given this language interpretation assumption, Applicant traverses the Examiner’s logic and conclusion for the following reasons.

First, it is not old and well known in the art to offer lower prices to people who are early adopters. Applicant directs the Examiner’s attention to the enclosed Declaration of Dr. Munch which provides a brief overview of the literature on this point and which summarizes the accepted academic and industry perspective on the prices paid by early adopters.

In view of the literature, and based upon his personal experience, Dr. Munch has concluded that the Examiner’s utilization of “official notice” (which states that early adopters obtain a price advantage) in the rejection is not well founded.

Second, Applicant’s invention is not limited to situations in which a new or novel product is being offered for sale. Applicant’s invention is equally applicable to new products (such as the Tivo recording device which is struggling to gain market share) and conventional products (such as a container of nails). None of Applicant’s independent claims are directed to the reward of “early-adopters.” In fact, all of the independent claims in the present application make no mention of “early adopters.” Instead, these claims specifically state that the method of selling articles of manufacture provide a “decreasing

discount in price to encourage and reward early **financial commitments.**"

Third, the *Walker et al.* prior art patent expressly and implicitly acknowledges that "early adopters" are going to pay a higher price than late adopters. Applicant directs the Examiner's attention to *Walker et al.*, and in particular to Column 1, lines 46 through 67.

Fourth, it has not been possible until the recent rise of the internet to economically communicate in sufficient granularity the relationship between cost to the buyer and seller's perceived cost of risk premium's (i.e., difference in price seller is willing to accept for laying off the risk) associated with each of the cost/risk-increasing events of a specific product's production run stages either, in the first place, AS AN ITEM IS ABOUT TO BE IN A GIVEN STAGE OF DEVELOPMENT, PRODUCTION OR DISTRIBUTION, OR, in the second case, AS AN ITEM IS STILL IN A STAGE.

Prior to the present invention, markets did not attempt to price the change in risk/costs from stage to stage in the supply chain itself and instead focused solely on a contracted end-of-chain result based on a buyer's acceptance or rejection of a combination of a product's time of delivery, a quantity and a price, either before or after the item had been produced. Prior to the present invention, there was no centralized mechanism for presentation, across a large number of buyers and sellers, the value of financial risk to be laid off by the producer at each cost/risk-inducing stage in the production and supply-chain processes themselves inside a given item. The present invention is new in the sense that it creates a mechanism for allowing market participants to lay (that is, pass along to the buyer) this risk off along a graphically depicted sequence that tracks the producer's cost-risk curve rising through the planning, production and distribution cycle of a particular item as the costs to sell the product rise along with the time and money necessary to clear the inventory and recover costs grows, as supply chains lengthen and become more and more costly. The present invention allows this trade-off to be explicitly updated and acted depending upon the production/supply chain stage at which an item is now or will be.

Fifth, the administration of such a system requires a significant amount of qualification of buyers based not just on credit-worthiness and financial strength, but also on the ability to participate in the market logistically. Some middle-market buyers –insufficiently large to individually subscribe an entire production run like a Costco or WalMart – can which have a large number of stores and consolidated warehouse capability for secondary distribution of single-store quantities to local outlets—must be verified to be adequately equipped with certain equipment, such as high-dock doors, clamp loaders, forklifts, slip sheet unloaders or other equipment to participate in a particular market for an item in order that cost-saving steps (e.g., floor loading rather palletizing goods, for instance, or packaging in bulk in cases rather than in individual cartons) in loading, consolidation, carton marking, packaging, load routing, document preparation and carrying costs may be implemented with confidence by the manufacturer. The manufacturer will not take the risk of costly rework without assurance in advance that the buyer understands the trade-offs in each phase of production and distribution.

Finally, Applicant has amended the pending claims and added new claims which distinguish the prior art.

In summary, the Examiner's view of obviousness based on a prior practice in this area is not consistent with the definition of qualification of participants in present invention, nor is the objection consistent with the considerable technical requirements –only recently made feasible with the widespread adoption of broadband internet access and computing power – that are necessary to administer and communicate these complexities and mapping them to a corresponding interface that is usable to both buyers and sellers. The present invention adds significantly to the art by its standardizing of opportunity costs through each stage of development, production and distribution of a particular item's production and supply chain processes and in communicating these in an electronic market now formed for each the item in each stage of its supply chain, from development to manufacturing to packaging to export, import and distribution.

In fact, the solution proposed by the *Walker et al.* prior art reference is premised upon and assumes that early-adopters pay a **higher price** than late adopters. *Walker et al.* suggest providing a variety of rewards through a reward program. Whether or not a reward is provided to a consumer will depend upon the level of success of the product. For example, Applicant directs the Examiner's attention to Column 2, commencing at line 61 of *Walker et al.* which reads in relevant part as follows:

"Upon attaining a predetermined level of product success, a selected set of "early-adopter" purchasers (purchasers who buy a product early in the product's life cycle) are rewarded. Thus, consumers are provided with an incentive to (i) buy a product earlier than they otherwise might have; or (ii) buy a product they might not have otherwise bought."

In fact, *Walker et al.* even suggests that the reward could be calculated based upon a fall in the product's price. Applicant directs the Examiner's attention to *Walker et al.*, at column 7, commencing at line 43, which reads in relevant part as follows:

"However, in other embodiments the measurement of product success may be, for example, product market share, product price, product revenue or product profit. For example, the measurement of product success may be the product price, and a reward is provided if the product price has fallen below a predetermined price."

In summary, Applicant traverses the Examiner's conclusion with respect to the feature of pricing in accordance with financial risk. The Examiner's conclusion that it is old and well known in the art to offer lower prices to people who are early adopters is not supported by the literature and is contrary to expert knowledge in this area, in accordance with the facts set forth in the Declaration of Dr. Munch. Additionally, the Examiner misunderstands the present invention, as claimed, as being particularly tailored to meet the situation of early adopters.

As demonstrated, the pending claims are not directed to the situation of an early adopter. **The pending claims are in fact directed to a broader situation, namely the sharing of economic risk associated with various milestones in the production and distribution of goods.** Indeed, the present invention enables buyers and sellers to act upon their varying levels of comparative economic advantage, differences which could induce buyers to participate in a market at one stage and not in another stage where advantage is less, on the same item. The possibility of opening up markets to allow buyers and sellers to actualize on comparative advantages is a significant advancement over the prior art. This concept is applicable to novel products and conventional products with equal ease.

2. **BUYER PRE-QUALIFICATION:** With respect to the feature of pre-qualifying the buyers, Applicant submits that there is nothing about the *Walker et al.* prior art reference which would teach or suggest the inclusion of this function. In fact, *Walker et al.* teaches **away** from the inclusion of this feature.

As will be discussed in greater detail below, *Walker et al.* provides for a variety of alternative reward systems. Every one of these reward systems goes into effect **after** the consumer purchases the product. Every one of the proposed reward systems provides some type of reward to those buyers that purchase a product early in the product life cycle. The reward may diminish or be nonexistent for later purchasers.

Because *Walker et al.* is expressly limited to post-sale reward systems, there is **absolutely no reason for a pre-qualification of the buyers.** The producer and reseller experience no financial risk after the purchase is consummated so there is not need for either of them to prequalify the purchasers. In summary, the Examiner's suggestion that one practicing *Walker et al.* would be motivated to prequalify buyers is not supported by the *Walker et al.* reference which in fact teaches away from such a combination. (Applicant has added new claims which teach the logistical qualification of potential buyers. Such logistical qualifications include a geographic proximity qualification, an associational qualification, and a temporal qualification, all of which can be utilized to reduce

the landed cost of goods.)

3. AGGREGATING OFFERS FROM A VARYING GROUP OF PURCHASERS: With respect to the Examiner's admission that *Walker et al.* does not teach aggregating offers from a varying group of purchasers, the Examiner contends that *Shkedy* teaches "pooling of offers of a plurality of buyers to arrive at a large order that can be submitted to a manufacturer." Additionally, the Examiner contends that it would have been obvious to a person of ordinary skill in the art to "include in Walker pooling offers from a plurality of different buyers, because this would expand the usefulness of Walkers invention and increase the likelihood that the system would be used by a greater number of buyers."

There is nothing in Walker which would teach or suggest such a combination; in fact, *Walker et al.* teaches **away** from the suggested combination.

Walker et al. provides for a variety of alternative reward programs. All of the reward programs provide some incentive (such as financial incentive) to the earlier purchasers. The amount of the reward diminishes so that later purchasers do not receive the same amount of reward as the earlier purchasers. However, there is no suggestion in *Walker et al.* that the consumers collaborate, cooperate, or organize their efforts in a manner which obtains for them as a group any economic advantage.

The primary teaching of *Walker et al.* is that each of the consumers is in fact a **competitor** with respect to the other consumers. The incentive for early purchase is the preferential treatment or reward obtained through the early action. Under the *Walker et al.* approach, each purchaser performs a solitary action (purchasing the product) without any knowledge of the actions of any other purchaser. Certainly, *Walker et al.* does not teach any cooperative or coordinated activity.

The only coordinated or cooperative activity even suggested by *Walker et al.* is the establishment of the reward program and its administration. These activities

are not conducted by any of the customers, but instead these activities are conducted by the product manufacturer or reseller.

In summary, Applicant contends that the combination suggested by the Examiner is not taught or suggested by *Walker et al.* Neither *Walker et al.* nor *Shkedy* take into account the logistical constraints (geographical, associational, temporal) which contribute significantly to the feasibility of highly competitive delivered pricing of the goods imported nor do they consider the practical supply chain constraints such as standardized shipping container volume limitations and the narrowing of cost savings opportunities prior to packaging, consolidation, and routing of containers. The present invention advances the prior art by allowing prospective buyers and sellers to realize economic advantages relevant to them in each of these supply chain stages. The existence of the supply chain stages is not even recognized by the cited prior art.

4. CASCADING GRAPHICAL USER INTERFACES: The Examiner contends that *Walker et al.* does not teach a plurality of cascading graphical user interfaces. However, the Examiner contends that using cascading graphical user interfaces is old and well known in the art, and that it would be obvious to a person of ordinary skill in the art to include in *Walker et al.* the cascading interfaces, because it would create a user-friendly environment and make the system easier to use. Applicant traverses this conclusion. While *Walker et al.* does discuss the utilization of computers to register the purchasers for the reward program, there is no depiction or discussion of the utilization of cascading graphical user interfaces for the entry or receipt of this information. The product and customer registration information can be submitted in an e-mail form which would not require or utilize any cascading graphical user interfaces. Only if the customer utilizes a wide area network or the internet to access a website would it even likely be useful to present a plurality of cascading graphical user interfaces. As *Walker et al.* is silent in this regard, it does not teach or suggest the combination made by the Examiner.

5. SENDING AGGREGATED BUYERS OFFERS TO MANUFACTURERS: The

Examiner admits that Walker does not teach "aggregating the buyers' offers and sending them to the manufacturer for acceptance." However, the Examiner states that *Shkedy* teaches "pooling orders and communicating those orders to a potential seller." The Examiner cites Column 4, lines 50-67 of *Shkedy*. The combination of Walker and *Shkedy* will be discussed in greater detail below.

6. AGGREGATED INPUT IN EXCHANGE FOR PRODUCTION GUARANTEES:

The Examiner further admits that *Walker et al.* does not teach providing "aggregated input from said plurality of potential purchasers" to "potential manufacturers in-part in return for a production guarantee from potential manufacturers." However, the Examiner seems to suggest a combination of *Walker et al.* and *Shkedy*, and cites Column 4, lines 50-67. This grounds for rejection will also be discussed in greater detail below.

THE SCOPE AND CONTENT OF THE PRIMARY REFERENCE USPN 6,049,778
TO WALKER ET AL.

The primary reference relied upon by the Examiner in rejecting the pending claims is USPN 6,049,778 to *Walker et al.*, which is entitled "Method and Apparatus for Administering a Reward Program," and which has been assigned to Walker Asset Management Limited Partnership.

Walker et al. is directed to the solution of a very particular problem, namely the problem associated with "newly-introduced goods and services" which the specification defines at Column 1, lines 9-11 as "new products."

Walker et al. notes that it is very important for new product to develop market share rapidly upon the introduction of the new product. Without a rapid introduction, the new product may fail or never gain consumer acceptance. The *Walker et al.* specification states that consumers are often slow to purchase new products, especially those containing new technology. For example, *Walker et al.* states the following at Column 1, lines 19 through 27:

"It is particularly important to develop market share rapidly upon the introduction of a new product. Otherwise, the product may fail to ever gain consumer acceptance. Unfortunately, consumers are often slow to purchase new products, especially those containing new technology. It is particularly difficult, for example, to sell new computer, electronic and other high-tech products. This slow adopting causes some new products to suffer from a "chicken-and-egg" problem, in which low sales of a product decrease the chance that the product will ever gain consumer acceptance."

As discussed above, *Walker et al.* recognizes that new products often have decreasing prices. *Walker et al.* acknowledges that many consumers are reluctant to purchase new products because the product price may decrease significantly with market acceptance and that initially high prices are typically necessary for manufacturers to recover product development costs.

Applicant and *Walker et al.* are in basic agreement on the typical pricing of new products. In fact, Figure 3B, of the present application includes a graphical depiction of the prior art.

Walker et al. is concerned with phases V and VI of this graphical representation. *Walker et al.* is not at all concerned with phases I, II, III, and IV of Figure 3B.

The solution proposed by *Walker et al.* is the creation and administration of a "reward program." Of course, the reward program requires that the purchasers of the product be "registered" somehow. *Walker et al.* system requires that a central controller store a "series of registrations, each of which corresponds to a purchaser of a product." See Column 2, lines 41-43.

Furthermore, the system of *Walker et al.* operates to calculate a "measurement of product success, such as the number of products sold." See Column 2, commencing at line 45.

While *Walker et al.* does teach the management of a "risk," the risk that is managed is the risk that **each consumer experiences** when he or she purchases a product. More specifically, the risk is that the purchase price will change in the near term future. This is described in *Walker et al.* at Column 3, commencing at line 49, which reads in relevant part as follows:

"In accordance with the present invention, early-adopter purchasers are rewarded only after the product has attained a predetermined measure of "success." The reward reduces or eliminates consumer reluctance to purchase the product, since any perceived risk is mitigated by the reward."

Walker et al. is not the least bit directed to the management of any other risk. There is no discussion or suggestion in *Walker et al.* that the risks associated with production, transportation, and distribution should, **or even can**, be managed.

Commencing at Column 4, *Walker et al.* discusses a variety of alternative systems for registration of the purchasers of the product. These include utilizing a computer network, utilizing a registration card, utilizing a telephone, utilizing a point of purchase registration system, utilizing an end-store kiosk, or utilizing the internet.

Figures 1 and 2 of *Walker et al.* depict a high-level block diagram of the system proposed by *Walker et al.* Figures 3 through 8 depict alternative databases for maintaining product registration information. Additionally, many of these figures also depict alternative techniques for determining the appropriate reward. Figures 9 through 10B depict in flowchart form the overall operation of a system constructed in accordance with *Walker et al.*

Figures 3 through 8 and 11 will now be discussed in detail

Figure 3 depicts a basic product registration database. There is a product

identifier, a unit identifier, purchaser name and address, store identifier, purchase price, and purchase date. Figure 3 depicts an exemplary database which depicts the registration of the purchase of four products.

Figure 4 is a graphical depiction of a product success database which defines the product success parameters. In the example of Figure 4, three different reward identifiers are utilized: R1, R2, R3, . Each of these reward identifiers corresponds to a range of sales of the product. At Column 8 of *Walker et al.*, a variety of alternative ranking systems are discussed. These ranking systems determine the nature and size of the reward that is provided to a purchaser. The system may utilize ordinal position, date, or may even allow the reward to be allocated through random selection or a lottery.

Figure 5 depicts the utilization of ordinal position.

Figure 6 depicts a database which utilizes three tiers of reward identifiers (R1, R2 and R3) and two tiers of early adopter identifiers (A and B), as well as a corresponding reward. Note that the reward is variable.

Figures 7 and 8 depict concrete examples of the utilization of reward identifier tiers and early adopter tiers. Figure 8 depicts a situation in which an account for a customer is maintained and account balances are credited as part of a reward.

Figure 11 depicts a utilization of the *Walker et al.* system for the sale of multiple items "packaged" together.

Walker et al. teaches essentially a "call option" on the possibility of a purchased item attaining a certain popularity level which puts the option "in the money". The possibility of the option attaining value is unknowable, and is impossible to account for in any recognizable or conventional sense, so *Walker et al.* teaches a system which is not suitable for a business; in contrast, the present invention provides a price/risk/cost advantage which is tangible. *Walker et al.* is strictly a "consumer" system.

THE SCOPE AND CONTENT OF THE SECONDARY REFERENCE USPN
6,260,024 TO *SHKEDY*

The Examiner relies upon USPN 6,260,024 to *Shkedy*, which is entitled "Method and Apparatus for Facilitating Buyer-Driven Purchase Orders on a Commercial Network System." *Shkedy* et al. is directed to a bilateral buyer-driven commerce system which aggregates individual buyers purchase requirements into a single collective purchase requirement, and sellers are located which are willing to bid on the collective purchase requirement.

Shkedy describes the prior art as being divided onto either "seller driven" systems or "buyer driven" systems. In a seller driven system, the seller assumes most of the commercial risk. In contrast, in a buyer driven system, the buyer assumes most of the commercial risk.

Shkedy distinguishes its system from prior art auction systems such as priceline.com as well as buyer clubs such as Costco.

The system of *Shkedy* purports to provide individuals with a collective bargaining power usually reserved for large retailers or corporations that can exercise buying clout by virtue of their size. *Shkedy* proposes aggregating individual purchase orders into a single aggregate purchased order, allowing each individual to receive more favorable pricing terms than could be achieved by acting independently. See Column 3, lines 58-65.

While *Shkedy* describes in detail a variety of alternative communication, payment, networking, database, interface, and cryptographic systems which may be utilized, *Shkedy* does not vary from its main theme of aggregating the commercial interest of a number of individuals in order to obtain a better price.

Shkedy requires the utilization of an intermediary which acts as an agent or representative of the group. The intermediary may be compensated through a flat fee or a commission. Alternatively, advertisements may be utilized to pay

for the administration costs. See generally Column 18, lines 23-36.

Shkedy discusses in particular a pooled purchase order (PPO) and a forward purchase order (FPO). The most relevant text that Applicant can find in *Shkedy* is found at Column 26, commencing at line 64, which reads in relevant part as follows:

"In a forward price embodiment, instead of providing a sealing price per item, the central controller 200 provides the buyer with a list of forward prices. The list is the price of the item for a given purchase date. If a buyer could wait for the manufacturer to produce the goods, he could get a cheaper price than a buyer who needed the item immediately. The buyer who needed the goods immediately would have to compensate a supplier for the added expense of keeping an inventory on hand. This concept is similar to just in time purchasing for large corporations, but now would be available to small corporations and individuals."

In contrast, the present invention teaches a seller-driven system which generates conditional offers which are presented to potential buyers. *Shkedy* contemplates a single delivered price for a given item on terms dictated by buyers and in turn accepted by sellers in response an F.P.O.

Shkedy requires that an intermediary solicit prices from several potential sellers and thus is a type of auction. Once the selection is completed, a single (F.O.B.) price is fixed. In contrast, the present invention opens a plurality of windows of purchase opportunities in the supply chain, so several different "prices" exist on a given item. The present invention allows buyers to formulate buying decisions in response to a thoroughly variegated view of the suppliers' capabilities in manufacturing and fulfillment as seen in the pricing signals in each of the supply chain windows.

Shkedy does not teach the qualification of the grouping of the manufacture by proximity or association. Applicant has added claims which take into account such qualification. The present invention advances the art by incorporating

logistical heuristics into the pricing process such that "bundling" of goods from a plurality of manufacturers can be economically achieved through the use of the model by one or more buyers. *Shkedy* does not teach the qualification of buyers by geography, associational, or temporal considerations. The present invention advances the prior art by prequalification of buyers on these criteria such that significantly competitive landed costs can be obtained.

Applicant will now address the fifth and sixth points raised by the Examiner in the rejection, since the Examiner's arguments depend upon *Shkedy*.

The Examiner admits that *Walker et al.* does not teach aggregating the buyers' offers and sending them to a manufacturer for acceptance. However, the Examiner contends that *Shkedy* teaches pooling orders and communicating those orders to a potential seller. While *Shkedy* does teach the pooling of orders, neither *Shkedy* nor *Walker et al.* teach the pricing of goods based upon the extent to which a financial commitment reduces the risk to a manufacturer. There is no teaching or suggestion in *Walker* or *Shkedy* of establishing risk and price milestones for products and obtaining financial commitments from interested purchasers, and then rewarding them for their early financial commitment. The sole exception that can be found in *Shkedy* is the textual portion quoted above. This merely discusses the acceptance of a time delay between placing an order and receiving the products. There is no discussion in *Shkedy* of a pricing which tracks milestones in the production, distribution, and retail phases of products.

The Examiner also admits that *Walker et al.* does not teach the provision of "aggregated input from said plurality of potential purchasers" to "potential manufacturers in-part in return for a production guarantee from potential manufacturers". The Examiner cites Column 4, lines 50-67 of *Shkedy*. This textual portion does not in fact support the Examiner's argument. There is nothing in or about the textual portion cited by the Examiner which suggests that the interested purchasers may enter into agreements with manufacturers through intermediary prior to the manufacturer of the articles in order to obtain a favorable price. As such, *Shkedy* does not teach or suggest the feature.

Furthermore, there is nothing in or about the *Walker et al.* reference which would teach or suggest a combination with *Shkedy*. In fact, taken together, *Walker et al.* and *Shkedy* cannot teach the present invention as *Walker et al.* is expressly and implicitly limited to activities which occur after the sale is consummated. *Walker et al.* teaches an individual purchase decision, but an administered reward program. Accordingly, *Walker et al.* does not teach the utilization of an intermediary in order to obtain favorable pricing on behalf of the buyers. In fact, it is clear that the intermediary in *Walker et al.* is an agent for the manufacturer and/or retailer, and is not an agent operating for the benefit of the buyers. *Walker et al.* is strictly post sale.

Shkedy is strictly presale. In contrast, *Shkedy* does teach the utilization of an intermediary that operates exclusively on behalf of the potential buyers.

SCOPE AND CONTENT OF THE PRESENT INVENTION

The present invention will now compared to *Walker et al.* the primary reference.

1. THE IMPACT ON MAKE/DON'T MAKE DECISION MAKING:

The present invention helps the producers of goods by improving the "make/don't make" decision making process before the product has been manufactured.

The *Walker et al.* prior art only influences the consumer's decision making process for the "purchase/don't purchase" decision, after the product has been manufactured. Consequently, it can not improve the "make/don't make" decision making process.

2. THE DEGREE OF CONNECTION OF CONSUMERS TO PROCESS:

The present invention directly and immediately involves the consumer the in the transaction; the individual decisions of consumers are aggregated and

ACTUALLY affect the manufacturing process. In the present invention, a single buyer can trigger production of goods.

The *Walker et al.* prior art does not directly involve the consumers until after the product is manufactured and offered for sale through retail outlets. So the consumer has no impact on production decisions.

3. RANGE OF APPLICABILITY:

The present invention has an impact on manufacturing operations, distribution operations, and retail operations.

The *Walker et al.* prior art **only** has an impact on post-manufacturing operations, specifically retail operations, a rather narrow range of applicability.

4. PRODUCTION CYCLE V. PRODUCT LIFE CYCLE:

The present invention is intended to have an impact on the "product lot cycle." It actually can determine whether or not there will even be production runs.

The *Walker et al.* prior art only has (or may have) an impact on consumers of the product depending upon sales during the "product life cycle."

5. NATURE OF THE ECONOMIC REWARD:

The present invention offers a dynamic, certain, and near-term reward for early financial commitments; aggregation of commercial interest serves as a triggering event for production decisions.

The *Walker et al.* prior art offers a static, uncertain (contingent), and long-term reward; the amount of the reward changes with changes in the cumulative sales; otherwise, the amount of commercial interest has no influence on

production decisions.

6. MARKET MAKING:

The present invention actually creates multiple new markets in heretofore invisible portions of the supply chain which allows the participation of producers, distributors, resellers, and consumers and the ability for each to realize competitive cost advantages in whichever stage such advantage might exist for each participant.

The *Walker et al.* prior art does not create any new market, but does allow consumers to participate indirectly in product success.

7. NEW PRODUCTS AND COMMODITY PRODUCTS:

The present invention rewards early financial commitments and thus has utility for new (novel) products and for old (conventional) products; accordingly, it has a wider range of applicability.

The *Walker et al.* references is suited only for the sale of new products for which substantial price drops are expected.

8. BUSINESS RISK MANAGEMENT:

The present invention directly minimizes business risk for the producer of the articles of manufacture; if there is little to no interest, the product is not manufactured at all, and no losses are incurred.

The *Walker et al.* prior art only indirectly (if at all) minimizes business risks; if there is little or no interest in the product, the producer loses money because product costs are not recovered and the consumers lose money because no economic reward is obtained because sales milestones are not met.

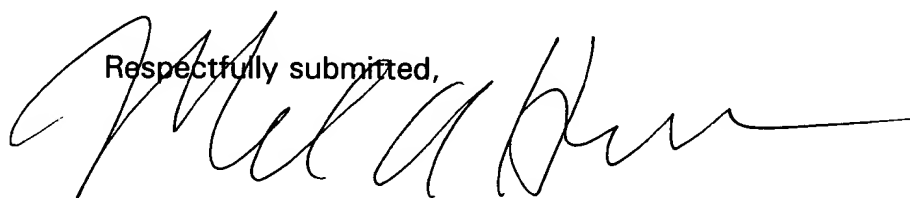
economic reward is obtained because sales milestones are not met.

DIFFERENCES BETWEEN THE PRESENT INVENTION AS CLAIMED AND THE
PRIOR ART

Applicant has amended Claims 1, 13, 20, 24 and 39 as shown to meet the Examiner's objections as to matters of form. Applicant has added new Claims 57 through 112.

Please charge Deposit Account No. 50-1060 for the additional claims. A request for a three month extension of time and a check in the amount of \$475.00 is enclosed herewith. If any additional fees are required please charge that fee to Deposit Account No. 50-1060.

Respectfully submitted,



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